The Responsibility to Prosecute and the ICC: A Problematic Relationship?

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ABSTRACT. The article addresses the links between the International Criminal Court (ICC) and the Responsibility to Protect (R2P) and the implications of their developments in the context of Libya and Syria. R2P as well as the ICC focus on the idea that sovereignty has evolved from being an *absolute* right towards including responsibility towards a state's own citizens. This idea was applied in the case of Libya where military as well as judicial intervention was supported by R2P language but intervention in Syria to stop human rights abuses in a similar vein is not forthcoming. The article focuses primarily on the Responsibility to Prosecute in these two cases. The principles of ending impunity and holding individuals accountable for their actions are not questioned by the international society, but the main problem is *how* this can be done in a politically sustainable way. Security Council referral doesn't seem to be the best option because too close ties with the Council will lead to the ICC becoming a politicised tool, moving further away from what it was designed to do: enforcing justice principles universally and impartially.

I. INTRODUCTION

This article deals with the links between the International Criminal Court (ICC) and the Responsibility to Protect (R2P) and the implications of their developments in the context of Libya and Syria. R2P is a consolidating norm in international society that takes account of the fact that states have a responsibility towards human beings in times of crises. Both concepts focus on the idea that sovereignty has evolved from being an absolute right towards sovereignty including responsibility towards a state's own citizens. The primary responsibility to protect a state's citizens lies with the state itself but should that state be unwilling or unable to do so, then the international community needs to step in and take on that responsibility. This idea has developed over the years and is institutionalised in R2P through a three pillar structure and similarly in the ICC through the principle of complementarity. The idea was applied in the case of Libya where military as well as judicial intervention was supported by R2P language.

Following criticisms over NATO's involvement in Libya and the civilian protection mandate that eventually resulted in regime change, a number of states became less supportive of R2P. Subsequent vetoes in the Security Council on resolutions that would have supported intervention in the Syrian crisis were based more on principle rather than substantive disagreements about the crisis itself. China and Russia in particular (but not exclusively) opposed invoking R2P as a smokescreen to legitimise regime change. This has also affected the ICC's ability to intervene in the conflict with judicial means. This article argues that for this and a number of other reasons, the ICC does not benefit from being too closely associated with R2P and military intervention. It is not a powerful mechanism for stopping ongoing violence and it risks becoming too much of a political tool, harmed by geopolitical struggles in the Security Council.

The principles of ending impunity and holding individuals accountable for their actions are not questioned by the international society, a clear Responsibility to Prosecute seems to exist, but the question is how this can be done in a politically sustainable way. Security Council referral doesn't seem to be the best option for this. Too close ties with the Council will lead to the ICC becoming a politicised tool, moving further away from what it was designed to do – to be instrument for universal and impartial enforcement of justice principles.

II. THE ICC AND R2P

Intervention in other state's affairs to protect human rights has been discussed in international relations for a long time. Predominantly centred on controversies surrounding humanitarian intervention, i.e. the intervention with military force to protect human rights in another state, the international community was trying to establish guidelines to ensure consistent application. As has been well documented elsewhere, in 2000, the International Commission

on Intervention and State Sovereignty (ICISS) acknowledged that external military intervention for human protection purposes has been controversial both when it happened – as in Somalia, Bosnia and Kosovo – and when it failed to happen, as in Rwanda. It tried to deal with some of these issues and also proposed establishing criteria for intervention in another state's internal affairs that go beyond mere use of force.

The 'responsibility to protect' is the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophes, such as mass murder, rape, starvation. Sovereignty is not just a right, but it also carries obligations such as a primary responsibility towards the state's own citizens

2.1. R2P in Practice

The question is how well this works in practice. The ICISS report was written just before September 11, 2001 and the situation has changed considerably. States are very reluctant to intervene in another state's internal affairs and the main emphasis has shifted towards counterterrorism rather than concerns for human rights as a whole. Even though the ICISS report enjoys widespread support in general by civil society, different UN institutions and a number of governments, there are problems with the report's implementation. There is a lack of operational capacity and the political will of parties that would have the capacities to intervene. There was always concern that the ICISS report could be used as an excuse to legitimate any form of intervention even if the motives are not humanitarian in nature. The intervention in Libya (discussed below) can be seen as a case in point where the protection of civilians turned to regime change. However, the situation in Darfur shows the other extreme:

it is a textbook example of a government that is 'unable or unwilling' (R2P language) to protect its citizens, but the international response has been rather weak.

R2P has no legal significance as it is not legally binding in international law. As Garwood-Gowers argues, R2P presents a "political or moral commitment by states"[1] to establish existing duties. R2P is a normative concept that confers powers to international institutions. It is a norm in the process of consolidating that is no longer questioned in content; the main disagreements surround questions of means, of *how* R2P can be implemented. The doctrine's normative language functions as political tool with the aim of changing behaviour. As Chesterman argues, "the true significance of RtoP is not creating new rights or obligations to do "the right thing"; rather, it is making harder to do the wrong thing or nothing at all."[2]

2.2. R2P and ICC – linkages and parallels

The ICC is linked to and has parallels with R2P in a number of ways. In the Secretary-General's 2009 'Implementing the Responsibility to Protect' report, the ICC is mentioned under pillar 1: "the responsibilities to protect, first and foremost, is a matter of State responsibility, because prevention begins at home and the protection of populations is a defining attribute of sovereignty and statehood in the twenty-first century." The aim is to "build responsible sovereignty, not undermine it."[3] In order to assist states in being able to protect human rights within their borders, the report suggests that –as a first step - states should become part of international institutions that deal with human rights and humanitarian

[1]Andrew Garwood-Gowers 'The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?' (2013) 36 UNSW Law Journal 600
[2]Simon Chesterman '"Leading from Behind": The Responsibility to Protect, the Obama Doctrine and Humanitarian Intervention after Libya' (2011) 25 Ethics & International Affairs 282
[3]Secretary-General, *Implementing the Responsibility to Protect* (General Assembly Sixty-third session 2009) 10

law, such as the ICC. The report further argues that "By seeking to end impunity, the International Criminal Court and the United Nations-assisted tribunals have added an essential tool for implementing the responsibility to protect." The report calls the ICC "one of the key instruments relating to the responsibility to protect"[4] It stresses the importance of individual accountability as a crucial aspect of the ICC's deterrence effect that aims to prevent mass atrocities from occurring, underlining R2P's clear emphasis on prevention as the most important aspect of its framework.

The ICC is again mentioned under pillar 3 (timely and decisive response). "Sovereignty does not bestow impunity on those who organize, incite or commit crimes relating to the responsibility to protect. (…) such acts could be referred to the International Criminal Court, under the Rome Statute."[5] This shows that the ICC is seen as a part of R2P or at least as part of the toolkit available under the concept. Fatou Bensouda, Chief Prosecutor of the ICC, called the Court as much[6] through its role of fighting impunity for some of the most serious crimes.

Both, R2P and the ICC Statute share a number of key assumptions and provisions. Both call for human rights and humanitarian concerns to be of international concern and make clear moral cases in favour of a responsibility of the international community to hold those responsible for atrocities to account. They both limit their scope to only a few crimes that are seen to be of utmost concern to humanity as a whole: war crimes, crimes against humanity and genocide. For both, the main question remains to be the one of the *means* – how can

[4]Ibid.
[5]Ibid.
[6]Fatou Bensouda, 'Closing Keynote Address' (Atrocity Reporting and the Responsibility to Protect, New York 2012)

those responsible be held to account? In national or international procedures? And how can such crimes be prevented?

R2P sets out in both, pillar 1 and pillar 3, that the primary responsibility to deal with crimes rests with the state in question. The ICC has a similar provision in its complementarity principle (Article 17 of the Rome Statute) that also ensures that the first responsibility to act lies with the affected state. The ICC can only act if the state is genuinely unwilling or unable to act itself and bring alleged perpetrators of the most serious human rights abuses to justice. R2P places its greatest emphasis on prevention as the key strategy to avoid humanitarian disasters from taking place. Similarly, the ICC focusses on its possible deterrence effect of criminal prosecutions, i.e. the notion that holding individuals accountable for their actions sends a clear signal and therefore prevents future crimes from happening.

The Security Council can refer situations to the ICC under its Chapter VII powers. Even though the rationale for using the ICC as a 'standing court' rather than having to create new ad hoc ones is compelling for a number of practical reasons, this is also very problematic because it politicises the ICC that is then perceived to be an extension of the Security Council. The ICC was intended to be largely independent from the UN and the Security Council, but if it is being used as a tool by an inherently political body such as the Security Council, this perception of independence is being lost which ultimately undermines the Court's credibility and legitimacy.

The main difference between the two is that R2P is a political concept whereas the ICC is a legal institution. This mismatch makes linking the two problematic – especially for the ICC.

R2P can call on the ICC as an international institution, but the ICC does not benefit from a too close association with R2P because as Schiff rightly argues: "R2P hinges on international political mobilization, the ICC depends upon legal judgment. Exponents of R2P might be charged with ineffectiveness, bias or hypocrisy but not politicization because its judgements are inherently political. The ICC can be charged with ineffectiveness, bias, hypocrisy and politicization because it's not supposed to make decisions on a political basis."[7]

These difficulties became apparent during the crises in Libya and Syria that both impacted on R2P and the ICC: in Libya, the ICC was called to act under R2P and similar but hitherto unsuccessful proposals were made in the case of Syria.

III. THE RESPONSE TO LIBYA

The crisis in Libya came quite suddenly and was fairly unexpected by world leaders.[8] Libya was ruled by Colonel Muammar Gaddafi who came into power in 1969 by overthrowing the King in a coup. His 42-year autocratic rule came to an end in February 2011 when the Libyan people engaged in a popular uprising against Gaddafi, inspired by anti-authoritarian protests that swept the Arab world in what came to be known as the Arab Spring. Gaddafi reacted by declaring war on the protesters and violently supressing the uprising. It is estimated that thousands of people died in the uprising. He called those that were organising against him in the city of Benghazi 'cockroaches' and vowed to hunt them down 'door to door' to execute them. This sounded very similar to language that had been used in Rwanda at the start of its genocide in 1994 and compelled the international community to no longer ignore what was

[7]Benjamin Schiff, 'The ICC and R2P: Problems of individual culpability and state responsibility' (International Studies Association Annual Meeting, Montreal 2011 of Conference) 8

[8]See for instance Alex Bellamy 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 25 Ethics & International Affairs

happening. On 26 February 2011, the UN Security Council unanimously adopted Resolution 1970, referring the situation in Libya to the ICC.

On 17 March 2011, the Security Council approved 'No-Fly Zone' over Libya, authorizing 'All Necessary Measures' to Protect Civilians (Resolution 1973 (2011)). The Resolution called for robust and prompt action to protect Libya's people from Gaddafi. This was the first time that the Security Council authorised military action against a functioning state for human protection purposes. (Bellamy, 2011, p. 263). This was also the first time the concept of the "responsibility to protect" was used by various UN agencies and the Security Council to condemn Gaddafi and impose a no-fly zone over his country. These references to R2P have been overemphasised by some authors,[9] but they are nevertheless existent. It was the first time the international community explicitly used R2P as a concept to intervene in a conflict, with both Security Council resolutions making references to R2P.

3.1.Referral to the ICC: Resolution 1970

Resolution 1970 was adopted unanimously by the Security Council on 26 February 2011. The Resolution was ground-breaking in that it referred the situation in Libya to the ICC unanimously and with reference to R2P. It stated that the Libyan authorities had a "responsibility to protect its population" and that states had a responsibility to intervene should Libya fail to do so. States in the Security Council reiterated their disapproval of the Libyan authorities using force against its own population. It was argued that "the widespread

[9]As argued for instance by Justin Morris 'Libya and Syria: R2P and the spectre of the swinging pendulum' (2013) 89 International Affairs

and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity."[10]

It is interesting to note that the Resolution was passed in the midst of an ongoing conflict, attempting to utilise the Court as a tool to end the fighting. There was a strong emphasis on the ICC's deterrence effect and attempts to utilise the Court to stop the crisis. India, for instance, referred to this by arguing that "we note that several members of the Council, including our colleagues from Africa and the Middle East, believe that referral to the Court would have the effect of an immediate cessation of violence and the restoration of calm and stability."[11] During this crisis, the ICC was seen as an instrument to achieve peace by dispensing justice in the crisis situation.

States in the Security Council emphasised the need for accountability and linked it to state leaders' responsibilities towards their own citizens. The US, for instance, argued that "Libya's leaders will be held accountable for violating these rights and for failing to meet their most basic responsibilities to their people."[12] And France similarly reiterated the importance of the ICC in this endeavour: "Today, faced with the atrocities we have seen, impunity is no longer an option. The International Criminal Court in this matter once again finds justification for its existence."[13]

[10]Security Council 'Record of 6491st Security Council Meeting' 26 February 2011
[11]Ibid.
[12]Ibid.
[13]Ibid.

Controversially, however, similar to Resolution 1593 (2005) that had referred Darfur to the ICC, Resolution 1970 exempted nationals of non-states parties (other than Libyan nationals) from the ICC's jurisdiction in this case. This concession had to be made in order to get support from the US, China and Russia who were otherwise very likely to have vetoed the Resolution. This exemption was met with some criticism. For instance, Brazil stated that it opposed such an exemption, arguing that "initiatives aimed at establishing exemptions of certain categories of individuals from the jurisdiction of the International Criminal Court are not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court."[14] As will be argued below, such exemptions are harmful to the institutional setup of the ICC as they go against the Court's aim to provide impartial justice that is fair to all.

Crucially, Resolution 1970 also included a paragraph that expressed the readiness of the Security Council to take further appropriate steps should Libya not comply with the terms of the resolution, paving the way for Resolution 1973.

3.2.Civilian Protection: Resolution 1973

Resolution 1973 was adopted on 17 March 2011 with 10 votes in favour and five abstentions (China, Russia, Germany, India and Brazil). The Resolution was heavily supported by the Arab League and the African Union, two regional actors in favour of international action. The text of the Resolution made clear that action was taken under Chapter VII with the primary aim of protecting civilians and achieving a ceasefire.

[14]Ibid.

The Resolution authorised the Security Council to take 'all necessary measures' to protect civilians and also to impose no-fly zones that could be enforced by NATO. The Resolution again used R2P language by reiterating the notion that it was Libya's primary responsibility to protect its own people. This was the first time R2P language was used to actually condemn Gaddafi and impose a no-fly zone over his country. In statements following the vote, a number of states referred to Libya's responsibility towards its own people. Even though a number of states argued that "Libya was not fulfilling the "international responsibility of protecting its population,"[15] the Council was divided on a number of issues with respect to Resolution 1973. Abstaining members pointed out that they were not opposed to taking action per se, but that they did not agree that using military force should be part of the Resolution. In the statement following the vote, Germany argued that they saw great risks in using military force: "If the steps proposed turn out to be ineffective, we see the danger of being drawn into a protracted military conflict that would affect the wider region."[16] Similarly, Brazil was critical of the means that were employed to ensure the protection of the Libyan people. They argued that even though they were supportive of the Arab League's call for "strong measures to stop the violence through a no-fly zone", (…) "the text of resolution 1973 (2011) contemplates measures that go far beyond that call."[17] Russia was similarly concerned that the Resolution included provisions that "could potentially open the door to large-scale military intervention."[18]

The initial implementation of the Resolution consisted mainly of air attacks on Libyan government positions that were most likely to target civilians. NATO attacked naval sites as well as tanks and other units engaged in combat, keeping the protection of civilians as the

[15]Security Council, 'Record of 6498th Security Council Meeting' 17 March 2011 7
[16]Ibid.
[17]Ibid.
[18]Ibid.

primary objective. After a few weeks it became clear, however, that the government's resistance was stronger than had been anticipated which led to NATO bombing a wider range of targets. When Gaddafi's family compound was targeted, killing his youngest son and three of his grandchildren, Russia described the attack as "disproportionate use of force".[19] It became questionable whether NATO's increased efforts could still be considered necessary to protect civilians or whether the mission had changed to include regime change. The conflict in Libya finally came to an end in August 2011 with Gaddafi killed and his son as well his head of intelligence captured, currently awaiting trial for alleged crimes against humanity.

The intervention in Libya was ground-breaking on a number of levels, but it also highlighted a number of problems with R2P in practice. The intervention was done with the primary aim to protect civilians and to stop massive human rights abuses from taking place. This changed, however, when NATO started expanding the targets it attacked in order to force Gaddafi out of power. This aim of regime change – that was seen by NATO leaders as necessary for achieving its aim of protecting civilians – became a major bone of contention and led to Libya being seen as the negative example of 'how not to do it'. A number of states that had been hesitant about the military intervention in the first place, argued that NATO had overstepped its mark and that R2P had been used a smokescreen for regime change. "Even the most ardent international advocates of R2P have acknowledged that the mandate was stretched to breaking point and maybe beyond it."[20] This 'stretching' can be seen as one of the reasons for the reluctance of the international community to get involved in the conflict in Syria.

[19]Security Council 'Record of 6528th Security Council Meeting' 4 May 2011
[20]Spencer Zifcak 'The Responsibility to Protect After Libya and Syria' (2012) 13 Melbourne Journal of International Law 12

A lot of parallels have been drawn between the situation in Libya and the crisis that started unfolding in Syria in March 2011. Most importantly the fact that both situations involve massive human rights violations resulting from a popular uprising against the ruling elite and that there have been numerous calls for international action.

IV. R2P, THE ICC AND SYRIA – UNDER THE LIBYAN SHADOW

Following similar peaceful demonstrations in Tunisia and Egypt as part of the Arab Spring, Syrian activists took to the streets in February 2011 to demand more economic prosperity, political freedom and civil liberties. In March 2011, the Syrian regime, led by President Bashar al-Assad, launched a violent crackdown on peaceful protestors after a group of children were arrested, detained and tortured because of painting anti-government graffiti on public buildings. Protests spread rapidly across the whole country and the reaction of the military forces became even more violent. According to the UN, more than 100,000 people have lost their lives to date and more than 6 million had to flee their homes. Throughout the uprising, the Syrian government has referred to the opposition as terrorists that are trying to destabilize the country. Opposition leaders counter that that was just the regime's way of justifying their attacks against civilians.

Initial enthusiasm regarding the application of R2P and that the concept could be invoked in cases of serious human rights abuses were dampened with the onset of this crisis. Syria has been subject to Security Council debates a number of times and it is clear that the Security Council is at a deadlock due to a number of reasons. Even though Security Council members continuously express their deep concerns with regard to the deteriorating situation, it is very clear that different members of the Council have different emphases on what could (and

should) be done about the crisis. As Garwood-Gowers argues: "disagreements over Syria have centred on two key issues: first, how to interpret events on the ground, and second, how to respond to the violence."[21] Western states have called for Assad to step aside and especially the UK, France and the US advocated early on some form of external intervention to stop the bloodshed and to protect civilians on the ground. The BRICS on the other hand placed a lot more emphasis on protecting Syria's sovereignty and territorial integrity, arguing that it was essentially a domestic matter and that no external pressure to change the regime should be applied.

Geopolitical considerations make the situation very difficult; national interests of Council members are more directly affected by Syria than they were for instance in Libya. China and Russia are close allies of Syria and the country is also seen as being central for the whole region's stability. Most importantly, however, it also became clear that Libya featured very heavily in considerations surrounding any resolution regarding Syria. On 4 October 2011, Russia for instance argued in a Security Council meeting that "The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect. It is easy to see that today's "Unified Protector" model could happen in Syria."[22]

Libya and the political fall-out resulting from it has undermined the trust between Western and non-Western state when it comes to R2P. Libya is cited as a negative example that is

[21] Andrew Garwood-Gowers 610
[22] Security Council, 'Record of 6627th Security Council Meeting' 4 October 2011 4

making Russia and China very reluctant to support action under the principle. A number of discussions in the Security Council clearly show that R2P itself is not in question, but that it is much rather a question of the means and also whose responsibility it is to protect civilians. The BRICS argue that it was Syria's and they are concerned that any resolution that authorises intervention would just be a smokescreen for regime change. South Africa, for instance, argued that "we have seen recently that Security Council resolutions have been abused, and that their Implementation has gone far beyond the mandate of what was intended."[23] Statements like these clearly show that the implementation of the R2P norm has been negatively affected by actions taken in Libya and that future agreements in similar crisis situations are difficult to achieve. As Gallagher and Ralph rightly argue: "Although the P3 have solid grounds for claiming their intervention delivered a positive outcome in terms of the protection of civilians mandate there were legitimacy costs to the breakdown of international consensus; and crucially, this has had a negative effect on (…) the quality of international society's performance in other R2P situations."[24]

4.1.Acknowledging the crisis - Resolutions 2118 and 2139

Syria has been subject to numerous Security Council debates. The first resolution in relation to Syria that was passed unanimously came on 27 September 2013 in form of Resolution 2118 (2013) that dealt with the destruction of Syria's chemical weapons. This resolution followed a chemical weapons attack by the Assad regime that killed thousands of civilians and set a clear timeframe for the destruction of such weapons. Crucially, however, this resolution was not passed under Chapter VII of the UN Charter and did not allow for coercive measures. The Resolutions includes the notion that "those individuals responsible for the use

[23]Ibid.
[24]Adrian Gallagher and Jason G. Ralph 'Legitimacy faultlines in international society: The Responsibility to Protect and Prosecute After Libya' (2014) FirstView Review of International Studies 19

of chemical weapons (…) should be held accountable." In statements following the vote, the majority of states emphasised such a need for accountability and ending impunity of those suspected of committing human rights abuses and some (for instance Luxembourg and Australia) even called for the situation to be referred to the ICC.

On 22 February 2014, the Security Council unanimously adopted Resolution 2139, the first resolution that explicitly dealt with the humanitarian crisis in Syria. The text of the resolution made it very clear that violence from all sides (i.e. the government as well as the opposition) was unacceptable and needed to stop. The resolution also "stresses that some of the violations [of obligations under international humanitarian law and international human rights law] may amount to war crimes and crimes against humanity." Furthermore, it "stresses the need to end impunity for violations of international humanitarian law and violations and abuses of human rights, and reaffirms that those who have committed or are otherwise responsible for such violations and abuses in Syria must be brought to justice." These two provisions in the resolution are important because they may open the way for prosecution on an international level should Syria fail to investigate these crimes itself. By recalling the need for accountability and by also already categorising acts as possible war crimes and crimes against humanity (i.e. ICC crimes), an environment that allows for future ICC action is created. ICC action is not excluded and arguably, even a first step towards possible action is taken. This shows that states in the Security Council agree on the established Responsibility to Prosecute to hold individuals accountable for serious violations of international humanitarian and human rights law.

Resolution 2139 makes direct mention of R2P, but the Resolution states that the primary responsibility to protect civilians lies with Syria; ostensibly opening the way for international action should this responsibility not be met. In statements after the vote, Australia, for instance argued that "the resolution is binding on all of us. Council members and the wider United Nation membership must themselves do what they can to pressure the Syrian authorities and the opposition groups to implement it. The resolution has made very clear the Council's expectations that its demands will be met and that there will be consequences for non-compliance." [25] France similarly argued that additional measures in case of non-compliance may follow. The US stated that "the resolution is important for two reasons. It has a clear demand for specific and concrete actions, and it is a commitment to act in the event of non-compliance."[26]

Russia agreed to the Resolution because it saw that many of its concerns had been taken into consideration in drafting the resolution and it therefore perceived it to be more balanced. It again criticised attempts of abusing R2P for other political ends in this context, however, by stating that "The Security Council decided relatively recently to consider the humanitarian situation in Syria, and only after it became clear that attempts to use the deterioration of the humanitarian situation to effect regime change were unsuccessful."[27]

The Resolution included clear demands for all parties involved in the Syrian conflict and asked the Secretary-General to report on the situation. He did so on 24 March 2014, arguing that he is "extremely concerned at the continuing violations of international humanitarian and

[25]Security Council, 'Record of 7116th Security Council Meeting ' 22 February 2014 4
[26]Ibid.
[27]Ibid.

human rights law in the Syrian Arab Republic and the culture of impunity that has developed. All sides in the conflict must adhere to international humanitarian and human rights law."[28] It has become clear that military action is very unlikely in Syria, but the possibility of judicial intervention is not fully discarded. States agree that R2P and the Responsibility to Prosecute as a principles are given but the question is again about the means – what can be done to fulfil those responsibilities?

4.2. The Responsibility to Prosecute and calls for ICC referral

There have been numerous calls for the situation on Syria to be referred to the ICC from a number of different sources. A large number of states in Security Council meetings mentioned the ICC as a possible (and suitable) instrument to deal with the crisis and to hold perpetrators to justice. Language used in different resolutions that label the crimes committed as 'war crimes' or 'crimes against humanity' is a first step towards possible ICC action because they are already categorised in terms of crimes the ICC has jurisdiction over. All resolutions also stress the importance of accountability as well as the fact that the first responsibility to act lies with Syria, which is in line with the ICC's complementarity principle. In January 2013, almost 60 states called on the Security Council in an open letter to refer the situation in Syria to the ICC.

Similar calls for ICC referral also came from a number of other sources: The Independent Commission of Inquiry on Syria noted in its 4th report in February 2013, that the ICC was an

[28]Secretary-General, 'Report of the Secretary-General on the Implementation of Security Council Resolution 2139' 2014 10

"appropriate institution for the fight against impunity to Syria."[29] And similarly in its 7th Report in February 2014, the Commission added a number of names to a list of Syrian and military units suspected of committing war crimes and crimes against humanity during the ongoing conflict. It also urged the Security Council to refer the situation to the ICC through its Chapter VII powers.[30]

The European Parliament similarly issued a resolution in which it "reiterates its calls for the Security Council to refer the situation in Syria to the International Criminal Court for a formal investigation."[31] The High Commissioner for Human Rights also repeatedly called for the situation to be referred to ICC. In a briefing to the General Assembly on 25 February 2014, Navi Pillay said that despite peace talks to resolve the crisis, the violence in Syria continued with war crimes, crimes against humanity and gross human rights violations committed by all parties to the conflict. She said: "The perpetrators of these appalling crimes act in defiance of law and the international community without fear of accountability. Referral to justice is imperative for future hopes of peace. Today, I repeat again my call to the Security Council to refer the Syrian crisis to the International Criminal Court."[32]

There seems to be an established 'Responsibility to Prosecute' as all Resolutions surrounding Syria and Libya unquestionably call for perpetrators to be held to account and justice to be brought to victims. There is no consensus on *how* this should be done, but there seems to be a consensus that it *has* to be done. As the Chair of the Independent International Commission of Inquiry stated on 18 March 2014: "We do not lack information on crimes or perpetrators.

[29]Independent International Commission of Inquiry on the Syrian Arab Republic '4th Report' 2013 127
[30]Independent International Commission of Inquiry on the Syrian Arab Republic Syria '7th Report' 2014
[31]European Parliament, 'Resolution on the situation in Syria' 2013
[32]Navi Pillay, 'UN High Commissioner for Human Rights Briefing to the General Assembly' 2014

What we lack is a means by which to achieve justice and accountability. In resolution 2139, the Security Council unanimously stressed the need to end impunity for violations of international law and reaffirmed "that those who have committed or are otherwise responsible for such violations and abuses in Syria must be brought to justice." It is for the Security Council to make this pursuit of justice possible."[33]

There are clear division between Council members on the tension between peace and justice in this context. Some argue that justice should not be pursued if peace has not been established in Syria and that pursuing justice would actually harm the peace process. Other say that the two go hand in hand and that justice is a first step towards peace. And even others argue that because there is no peace process in Syria, it cannot be harmed by pursuing justice.

These divisions also became evident during the debates following another draft resolution on Syria on 22 May 2014. Sixty-five states submitted a resolution to the Security Council, proposing to refer the situation of Syria to the ICC. The resolution was (not surprisingly) vetoed by Russia and China that were both concerned about the possibility of using such a resolution as pretext for armed intervention with the ultimate aim of regime change. Any possible ICC action is dependent on state cooperation which includes the apprehension of suspects, by force if necessary. Russia stood firm in its view that peace had to come before justice and also that the Libyan example had shown that referrals to the ICC "did not help resolve the crisis, but instead added fuel to the flames of the conflict."[34] Russia argued that Syrians themselves were responsible for settling the crisis and that the Geneva Communique continued to remain at the core of peace efforts. China was similarly concerned that ICC

[33]Independent Commission, 7th Report
[34]Security Council, 'Record of 7180th Security Council Meeting' 22 May 2014 13

intervention would hamper peace negotiations.[35] It furthermore stated its principled position against ICC intervention, favouring prosecutions in domestic contexts.

The draft resolution contained a number of references to R2P, such as Australia's statement that "The Security Council has a responsibility to protect, a responsibility mandated by all our leaders at their World Summit in 2005, and to prevent mass atrocities where we can."[36] Furthermore, "The Council's roles was specifically recognized in the Rome Statute, because accountability is central to protection and to the Council's fundamental responsibilities relating to the maintenance of international peace and security." Australia favours justice before peace, but also argued that the two are inextricably linked. Rwanda similarly stated that the Security Council's responsibility for international peace and security "includes the responsibility to protect and the obligation of (sic) hold accountable the perpetrators of the most serious crimes."[37]

4.3. Selective justice

Even though a great number of states decided to vote in favour of the 22 May resolution, the draft was not without its critics. Criticisms related to the way the resolution exempted non-states parties from the ICC's jurisdiction, thereby applying a very selective approach to what should be impartial and equal justice. This again shows the difficulties and problems attached to the ICC being used as a political tool by the Security Council. Such selectivity might be politically necessary to gather enough support for the resolution, but it is detrimental to the ICC's perceived impartiality and legitimacy. These kinds of exemptions seem to become

[35]Ibid. 14
[36]Ibid.
[37]Ibid.

common norm in Security Council referrals as the resolutions that referred the situations in Darfur and Libya similarly exclude all non-states parties except the ones in question. It is clear that such selectivity is problematic for the ICC that aims to be an impartial and fair body.[38] This point was also made by a number of states following debates after the vote on the 22 May resolution. First and foremost, Argentina made a number of critical arguments against such selectivity, arguing that this harms the ICC: "Argentina decided not to be a sponsor of the initiative, because it was also our objective to preserve the integrity of the Statute, which requires referrals to the Council to be formulated in the appropriate terms so as not to undermine the legal foundations of the Rome Statute itself or the Court's validity and effectiveness."[39] (Record of 7116th Security Council Meeting 2014, p. 10) It criticised that the resolution asked states to "accept as normal the exercise of selective justice" and that "there seems to be an attempt to make us believe that undermining the integrity of legal instruments in no way hinders the objective of achieving justice."[40] Argentina called the provision of deferring all costs resulting from an ICC referral to the ICC as "blatantly unfair".[41] Similarly Chad argued that "While voting in favour in principle, Chad regrets that the draft resolution (…) provides for the discretionary treatment of a category of State nationals with respect to the same crime. However, such exemptions (…) undermine the principle of settling scores and the ideal of independent and credible international criminal justice for all, without exception, for the most serious crimes."[42]

Bosco argues that such double standards are part of global governance and that the ICC simply reflects them, rather than aiming to alter them. He concludes that "the court's first

[38]It is even debateable whether such exemptions are legal or workable in practice. See for instance Robert Cryer 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 Leiden Journal of International Law
[39]Security Council 10
[40]Ibid.
[41]Ibid.
[42]Ibid.

decade suggests that it may be possible to design international institutions around power – but not to escape it."[43] Even if this may be the case, it still raises further questions about the appropriateness of the Security Council as the body that can take decisions regarding the ICC. As Gallagher & Ralph observe, three of the P5 are not states parties to the ICC and there is no requirement that non-permanent members be states parties.[44] This raises the question of whether the Security Council is even the most appropriate body to utilise the ICC if its permanent members are not states parties and therefore not under the Court's jurisdiction themselves.[45]

V. IMPLICATIONS FOR THE ICC AND ITS LEGITIMACY STATUS

There are two main issues that are worth highlighting in the context of the present analysis. The first relates to the nature of criminal justice more generally – i.e. the pursuit of international justice during an ongoing conflict and the second to the relationship between the ICC and the Security Council – i.e. the use of the ICC as a political tool.

5.1. The Nature of Criminal Justice

The first issue related to ICC action in the midst of an ongoing conflict is a more general one that lies in the nature of criminal justice itself. As Mills rightly argues: "Criminal justice is, by its very nature, retrospective, but the ICC is embedded within contemporary global political realities and has been called to perform a prospective function – deterrence. It has

[43]David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* Oxford University Press 2014 189
[44]Adrian Gallagher and Jason G. Ralph
[45]Indeed, Ralph suggests that Security Council members that are not party to the Rome Statute should abstain from votes referring or deferring situations to the ICC. See J. Ralph, 'The International Criminal Court', in A. Bellamy and T. Dunne (eds.), *Oxford Handbook of the Responsibility to Protect* (Oxford: Oxford University Press, forthcoming 2015).

also been deployed in the midst of conflict to perform a conflict management role or to induce leaders to stop their atrocities or force them to step down."[46] Resolution 1970 that referred Libya to the ICC clearly showed that the ICC was used in that particular instance in the middle of a conflict with the aim of stopping ongoing violence.

There has been an overall shift in R2P's focus: it was primarily meant to be a humanitarian doctrine, focussing on the prevention of human rights abuses, but it has become more of a conflict resolution tool. R2P is present-looking or prospective, the ICC on the other hand is retrospective but with a prospective function of deterrence as well as a conflict management function. The difficulty lies in determining what functions can actually be fulfilled by an international institution in times of an ongoing crisis. This links to the debate of peace versus justice and the question whether justice can be achieved before peace has been established? There are fears that if a situation is referred to the ICC, this can then lead to pressure for military action to enforce possible arrest warrants (especially Russia is concerned that referral will lead to another resolution authorising military action). As Mills rightly points out, "if the ICC is to be used in the middle of conflict, it requires further support from the Security Council and other actors."[47] It is therefore very difficult (if not impossible) to discuss ICC action (judicial intervention) without also having to consider some form of military action to support it.

The ICC is dependent on state cooperation to fulfil its mandate (including apprehending suspects) which might involve the need to use military force. Particularly Russia and China

[46]Kurt Mills 'R2P3: Protecting, Prosecuting, or Palliating in Mass Atrocity Situations?' (2013) 12 Journal of Human Rights 340
[47]Kurt Mills 'The Responsibility to Protect and the International Criminal Court: Complementary or Conflicting' (2014) 4 AP R2P Brief 10

are opposed to possible military action that might follow a resolution that refers the situation in Syria to the ICC. They both fear that they might be 'dragged' into military intervention should they agree to ICC action. Tis was the case in Libya where Resolution 1970 referred the situation to the ICC and Resolution 1973 that followed then authorized military action to help enforce the former. Furthermore, on the question of whether justice could (and should) be pursued before peace has been established, Stahn rightly argues that the problem in Syria lies in "the inherent tension between the implementation of the disarmament regime under Resolution 2118 (2013) and investigations and prosecutions of crimes committed by the Assad regime before a transfer of political power. The destruction of Syrian chemical weapons requires information, support and cooperation by the Syrian government. (…) The issuance of arrest warrants would complicate this process."[48] It is obvious that peace needs cooperation and arrest warrants resulting from possible ICC action would be harmful in the process.

5.2. Relationship between the ICC and the Security Council

The second issue that the Libya and Syria conflicts clearly highlight is the fact that the ICC can be (and is being) used as a political tool in the Security Council. It is generally agreed that the ICC is part of the toolkit when considering action under the R2P umbrella, but: this politicises the ICC which is – at least on paper - meant to be an impartial and neutral body and it becomes an extension of the Security Council which is by its very nature a deeply political body. Being linked to R2P in Security Council deliberations can be detrimental to the ICC's perceived legitimacy as the R2P concept in itself has become controversial after Libya. Russia and China are objecting to any measures that include R2P language because of

[48]Carsten Stahn, 'Syria, Security Council Resolution 2118 (2013) and Peace versus Justice: Two Steps Forward, One Step Back?'

the negative experiences with Libya. They do not seem to explicitly object ICC action, but their opposition is primarily against R2P and how the concept had been distorted during the Libya conflict. The Resolution that failed to be adopted on 22 May 2014 showed that the main concern of a possible ICC referral centres on the possibility of this then being a first step towards regime change by force. This could be seen by Russia, for instance, arguing that ICC referral was just a 'pretext for armed intervention'.

A number of different Security Council Resolutions related to Syria recall the need to hold individuals to account for their actions. The Resolutions reaffirm "that those who have committed or are otherwise responsible for such violations and abuses in Syria must be brought to justice." It is therefore clear that the *overall* concept of a Responsibility to Prosecute is not in question, but that it still needs to be decided *how* it can be done. Resolution 2118 "expresses its strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be held accountable." And similarly, Resolution 2139 (2014) stresses "the need to end impunity for violations of international humanitarian law and violations and abuses of human rights." The same resolutions also include language that makes international prosecutions possible by claiming that some of the acts committed may amount to war crimes or crimes against humanity. China and Russia did not veto these resolutions and it is therefore clear that agreement exists between states in the international society that these kind of crimes that are taking place cannot go unpunished. The difference lies in the approach of how to achieve justice – Russia and China have historically been against interventionist politics and emphasise state sovereignty and the state's own responsibility to act.

Using the ICC as a tool at the disposal of the Security Council as a political body raises the question of the context in which ICC has been given jurisdiction. The Security Council has the right (within existing UN Charter provisions) to determine a threat to international peace and security and decide on appropriate action, but this is a political decision, not a judicial one. The ICC was intended to be largely independent from the UN and the Security Council, but if it is being used as a tool by the Security Council, this perception of independence is lost and it ultimately undermines the Court's credibility and legitimacy.

In addition, the fact that the adopted Security Council resolutions exempt non-states parties from the Court's jurisdiction is very problematic for the selectivity these resolutions exercise. As Louise Arbour[49] rightly argues, referrals in the cases of Libya and Darfur have done little to enhance the standing and credibility of the Court and have also contributed very little to peace and reconciliation in the countries. She argues that even though such referrals enhance the reach of accountability, they do so at a cost that is very difficult to bear for an international justice mechanism. Such selectivity jeopardises one of the rule of laws basic premises of 'equality before the law'. As Christian Wenaweser, then President of the ICC's Assembly of States Parties, pointed out in 2011 that "in the future, we … no longer have to look at referrals from the point of view of acceptance of the Court … but rather from the best interest of international criminal justice. This means in concrete terms a genuine commitment to ensure justice is done, by providing the necessary diplomatic and financial support."[50] In an interview with David Bosco "Wenaweser was more pointed, "Is the Security Council

[49]Louise Arbour, 'Opening Speech from the International Crisis Group's President & CEO' (Global Briefing 2013: Doctrines Derailed? Internationalism's Uncertain Future, London: International Crisis Group 2013)
[50]Christian Wenaweser, 'Closing Remarks' (Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 10th Sesssion, New York 2011

genuinely committed to making sure that there is no impunity or is this about something else?" That "something else" was political control."[51]

Security Council referrals politicise the Court and exempting certain states incorporates double standards that are not easily reconcilable with the Court and its aim of dispensing impartial justice. By not applying fair principles, applicable to all in equal measures, the ICC's perceived legitimacy decreases. There is also a normative argument to be made in that all states *should* be required to cooperate and be answerable to the ICC in cases of Security Council referral because in such cases, the ICC is acting for the UN as a whole i.e. in the name and interest if all states.

VI. CONCLUSIONS

The ICC is more than just a tool for the Security Council, however, and being side-lined by the UN does not mean that it is becoming less important in its overall endeavour. As could be seen from the recent crisis in the Ukraine, where the state accepted ICC jurisdiction on an ad hoc basis, the ICC is very much alive and kicking. It still has other obstacles it needs to deal with and overcome (such as the recent AU 'backlash' against the ICC). Too close ties with the Security Council are not desirable for the ICC because politicisation leads the ICC away from its initial aim: that of impartial justice.

The ICC can benefit from being associated with R2P especially when it comes to the first priority of 'prevention'. Holding individuals to account for crimes is designed to have a

[51]David Bosco 172

deterrence effect, preventing future crimes from happening. This association is becoming less beneficial, however, if it is then linked to military intervention based on Chapter VII action. The ICC needs assistance from states for its enforcement – with force if necessary – which again highlights problems attached to the Security Council referring cases. The basic principle of a Responsibility to Prosecute is not challenged – the question is one of how, not whether and it is becoming increasingly clear that Security Council referral is not the best way forward.